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Supreme Court, U.S.
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No. 98-880

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

EMILIO FIGUEROA, DBA THE EXPORT GROUP,
Petitioner,

v.

MEXICAN COFFEE INSTITUTE,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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INMECAFE, in its opposing brief[1], rewrites the holding of this Court in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1980) by branding the Court's 60(b)(6) requirement of "extraordinary circumstances" as a "talismanic phrase," (Brief in Opp., p.7), the incantation of which is optional. If there is a talismanic approach to Rule 60(b)(6), it is the three-part test employed by the United States Court of Appeals for the Ninth Circuit, a formula which expressly supplants this Court's "extraordinary circumstances" *analysis* to make Rule 60(b)(6) categorically available to foreign sovereigns with inventive corporate counsel.[2]

It is clear that the rigid three-part test championed by INMECAFE accords with neither the majority nor the dissents in

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[1] INMECAFE's brief fails to comply with the listing requirement of Rule 29.1.

[2] See, *Gregorian v. Izvestia*, 871 F.2d 1515, 1523, 1526 (9th Cir. 1989) (" 'Extraordinary circumstances analysis has. . .been supplanted by the three-part test"); *The Export Group v. Reef Industries, Inc.* (No. 96-55811) (9th Cir. 1998) (Pet. App. at A-3).

Liljeberg. Each of the three opinions expressly recognized the "extraordinary circumstances" requirement; however, they disagreed as to its application. The majority concluded that the facts presented extraordinary circumstances while Justice O'Connor, dissenting, would have remanded the question for consideration by a lower court. Chief Justice Rehnquist, also dissenting, and joined by Justices White and Scalia, concluded that the facts did not rise to the level of "truly extraordinary circumstances," 486 U.S. at 847, and did not warrant application of Rule 60(b)(6).

The "extraordinary circumstances" requirement is neither a talisman nor, as INMECAFE also suggests, "a rigid test that would straitjacket Rule 60(b)(6) in a manner inimical to its purpose." (Brief in Opp., p.7). It is the law.

Applying the appropriate test to the facts in this case, INMECAFE's mistake of law defense becomes a red herring, not properly the subject of Rule 60(b)(6) relief.[3] Since the plain language of Rule 60(b)(1) explicitly governs relief on the grounds of "mistake" or "excusable neglect," Rule 60(b)(6) cannot be used to grant relief for INMECAFE's mistake of law. In other words, INMECAFE's attempt to garb its mistake of law defense in the raiment of clause (6) runs aground on the bedrock principle that clause (6) may not be used as a vehicle for circumventing

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[3] Professor Moore, disapprovingly, notes that the Ninth Circuit's unique approach ignores the "extraordinary circumstances" requirement and adopts the reasoning of "two other Ninth Circuit cases that dealt only with relief under Rule 60(b)(1)." Moore's Federal Practice 3d., § 60.48[3][f].

clauses (1) through (5).

In any event, this eccentric mistake of law excuse does not withstand close scrutiny. In the present case, the panel did not explain how INMECAFE could have harbored a reasonable belief it was immune from suit under the Foreign Sovereign Immunities Act (FSIA) at the time default was entered against it on May 22, 1985. It was not until almost four years later, on April 12, 1989, that the circuit court issued the footnoted dictum upon which INMECAFE purportedly relied. Thus, barring a wrinkle in time, INMECAFE could not have mistakenly relied upon the footnoted dictum in *Gregorian* at the time default was entered against it.[4]

Jurisprudential concerns disfavor such a perfunctory approach to cases involving sophisticated neighboring sovereigns engaged in commercial activities. First, the fact that INMECAFE is a foreign instrumentality engaging in tactical default and represented by elite corporate counsel is certainly not so extraordinary as to bring it within Rule 60(b)(6). Further, given that a change in

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[4] In fact, INMECAFE's first mention of the inapposite footnote in *Gregorian* was in its motion to set aside the default judgment on June 4, 1992, (Brief in Opp., p.4), filed eleven months after entry of the judgment.

Even if INMECAFE had relied upon the footnoted dictum in *Gregorian*, such reliance would not have been reasonable, given that the FSIA's plain meaning, Pet. App. A-18, as well as other courts' interpretations of the statute, A-21, in addition to the legislative history, A-23, all indicated that INMECAFE did not enjoy sovereign immunity from suit for torts committed in the course of commercial activities.

the decisional law does not amount to extraordinary circumstances for less savvy litigants, see Moore's Federal Practice § 60.48[5][b], it would indeed be irrational and unfair if a foreign instrumentality's erroneous belief that the decisional law had changed in its favor *always* rose to the level of extraordinary circumstances.

Review is vital in this case, both to prevent a manifest injustice and to provide principled guidance, by establishing a uniform rule for all foreign sovereigns and instrumentalities engaged as market participants.

In light of the fact that the Ninth Circuit's unprecedented three-part test has openly supplanted this Court's reasoned jurisprudence, there is a clear conflict in the decisional law. Thus, the need for plenary review of the action below is indisputable; indeed, petitioner suggests that reversal is now in order.

Respectfully submitted,

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